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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION No. 250 OF 1997

Union of India)
through T. C. Subramanian,) Applicant /
Income Tax Officer, Ward (Orig.Complainant)
27(3), Mumbai)

Vs.

1. M/s. Commercial Fibres)
Saheb Building, 5th floor,
Dr. Dadabhai Nauroji Road
Mumbai 400 001.)
)
2. Mr. K. R. Menon,)
)
3. Mr. K. B. Menon,)
)
4. Mr. C.D. Menon)
)
5. Mr. T.C. Krishnan,)
)
6. Mrs. Thangam K. Mani,)
)
7. Mrs. Sarojini Menon,)
)
8. Mrs. Saraswati Menon,)
)
9. Mr. C. Ravi Menon,)
)
10.Mr. C. Rajan Menon,)
)... Respondents
11.Mr. C. Jayan Menon.) (Orig. Accused)

Mr. R. V. Desai with H.V. Mehta, advocates for the applicant.

None present for the respondents.

CORAM : J.H. BHATIA, J.

DATE : FEBRUARY 15, 2007.

ORAL **JUDGMENT**

. Heard Mr. H. V. Mehta, the learned counsel for the applicant - Union of India.

None appeared for the respondents.

2. Perused relevant documents and the impugned order, passed by the Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai.

3. Applicant's case in brief is that, the respondent no.1 is a partnership firm and respondent Nos. 2 to 11 are its partners and they were in charge and responsible to the accused no.1 for the conduct of its business. It was alleged by the Income Tax Department that the accused and its partners had concealed and evaded income to the tune of Rs.2,34,265/- and thereby committed an offence punishable under S. 276-C(1)(i) and 277(i) read with S. 278-B of the Income Tax Act, during the year 1979-80. The Income Tax Officer, after obtaining sanction from the Commissioner of Income Tax, filed complaint against the respondents / accused.

4. At the outset, it may be stated that respondent Nos. 2, 3, 5 and 6 were not served by the Department and their names were deleted on 24-8-1995. The trial was to proceed against the remaining accused. On behalf of the accused / respondent Nos. 1, 4, 7 to 11, an application was made for discharge. After hearing the parties, the learned Additional Chief Metropolitan Magistrate passed the impugned order dated 16th June 1997, discharging the said respondents on three grounds. Firstly, notice was not given to the accused persons, nor an opportunity of hearing was given to them, before sanction was accorded to prosecute them, particularly, in view of Section 279, which gives right to the accused to compound the offence and thus, they were deprived of the right to move for compounding of offence. Secondly, respondent Nos. 9, 10 and 11 were not even partners of the firm on 31st October 1978, when the alleged offence was committed, because they had joined firm as partners for the first time on first November 1979. Thirdly, respondent Nos. 4, 7 and 8 being ladies, they are not expected to be in charge of and responsible

for the business. According to respondents, these three accused were sleeping or dormant partners. The learned Additional Chief Metropolitan Magistrate held that prosecution has not shown prima-facie that they were active partners of respondent no.1 and they had played any important role, when the alleged offence was committed. On these grounds, the respondent Nos. 1, 4, 7 to 11 also came to be discharged. This order has been challanged by the Revenue in this Revision Petition, contending that the learned Additional Chief Metropolitan Magistrate committed serious error in appreciating facts and legal position while passing the impugned order.

5. After perusal of the impugned order, it becomes clear that as far as respondent Nos. 9, 10 and 11 are concerned, they were not the partners of the firm on 31st October 1978, when the alleged offence of evading the tax was committed. In paragraph 7 of the impugned order, the learned Additional Chief Metropolitan Magistrate noted that even in the order passed by the Second Income Tax Officer,

B.S.D. (South) Bombay, it is averred that the firm was re-constituted as two partners Mr. B. C. Krishnan and Y. K. Mani had retired from 31-10-1987 and Rajan Menon, Ravi Menon and Jayan Menon, who are respondent Nos. 9 to 11, had joined the firm with effect from 1-11-1978 as partners. In view of the assessment order passed by the Income Tax Officer, it was clear that when the alleged offence was committed, respondent Nos. 9, 10 and 11 were not partners of the firm, and therefore, they could not be held responsible for any criminal act, committed by the firm or the other partners, prior to their joining firm as partners. I find no fault in the impugned order in respect of respondent Nos. 9, 10 and 11 and the learned counsel for applicant also fairly conceded that these 3 persons could not be made accused in the matter.

6. The learned Additional Chief Metropolitan Magistrate noted that accused Nos. 4, 7 and 8 are ladies and according to them, they were not active partners of the firm and were only sleeping partners, for the

purpose of profit only and the prosecution had not shown prima-facie that they were active partners of the firm. In support of this, the learned Additional Chief Metropolitan Magistrate placed reliance upon **TMT Thangalakshmi Vs. Income Tax Officer, (205 I.T.R. page 176)** wherein it was held that there must be specific averment in the complaint to the effect that the partner in the firm, at the time, the offence was committed, was in charge of and was responsible for the conduct of business of the firm. There can be no difference of opinion on this point. However, it needs to be pointed out that in paragraph 3 of the complaint, it was specifically mentioned that accused No.1 is a registered firm and at the material time, accused Nos. 2 to 11 were partners of accused No.1 and were the persons in-charge and responsible to accused no.1 for the conduct of its business. Thus, in the complaint, there was specific averment that all the accused persons were in-charge of as well as responsible for the conduct of business of the firm. Whether accused Nos. 4, 7 and 8 were admitted to the partnership

firm only for profits and whether they were sleeping or dormant partners and not active partners, could be decided on the basis of material which could be produced at the time of trial. In fact, this could be decided on the basis of the deed of partnership, which could specify role of the concerned partners. If certain partners are admitted only for profit or certain partners are to be dormant partners, such terms of agreement one expected to be incorporated in the partnership deed. The learned Additional Chief Metropolitan Magistrate nowhere referred the contents of partnership deed to come to the conclusion that these 3 partners were not active partners and were only sleeping or dormant partners. Therefore, it is difficult to accept the finding of the trial Court that these 3 partners are entitled to be discharged on this ground also. It may be noted that accused Nos. 7 and 8 are ladies, but accused No. 4 is Mr. C.D. Menon and he is not a female. The learned Additional Chief Metropolitan Magistrate, committed the factual mistake also.

7. The main ground of discharge appears to be that before according sanction for prosecution, the Commissioner of Income Tax had not issued notice to the accused, nor they were given an opportunity of hearing. The learned Additional Chief Metropolitan Magistrate observed that in view of Section 279(2), the accused persons had right to compound the matter and if the notice would have been given, they could have moved for compounding the same and this could avoid their prosecution. The learned Additional Chief Metropolitan Magistrate found support to this view from several judgments of Bombay, Calcutta and Rajasthan High Courts. However, the learned counsel for the applicant pointed out that the view taken by the different High Courts in respect of issuance of notice is not approved by the Supreme Court and the Supreme Court has held that notice before according sanction to prosecution is not necessary and that the Section 279(2) of the Income Tax affords only an opportunity to compound the matter, but it does not give a right to the party to insist for compounding. In **Union of India & Anr. Vs. Banwarilal Agarwal [(1998)**

7 SCC, 652], Their Lordships observed as follows-

> . **"We further find that sub-section (2) of Section 279 is a provision which enables the Chief Commissioner or the Director General to compound any offence either before or after the institution of proceedings. There is no warrant in interpreting this sub-section to mean that before any prosecution is launched, a show-cause notice should be given or an opportunity afforded to compound the matter. The enabling provision cannot give a right to a party to insist on the Chief Commissioner or the Director General to make an offer of compounding before the prosecution is launched."**

8. The learned counsel for applicant also points out that relying on the decision in **Union of India & Anr. Vs. Banwarilal Agarwal,** the learned Single Bench of this Court [Coram : V.M. Kanade, J.] also

allowed Revision Petition No. 248 of 1997, **Union of India Vs. M/s. Gupta Builders & Ors.,**by the judgment dated 8-12-2006. It may be noted that decision of Supreme Court in **Union of India & Anr. Vs. Banwarilal Agarwal** was rendered on 16th October 1988 while the impugned order was passed on 16th June 1997, and therefore the learned Additional Chief Metropolitan Magistrate did not have benefit of the Supreme Court judgment. Anyhow, the legal position in this respect is now settled by the Supreme Court and in view of this, the impugned order discharging the accused persons on the ground that prior notice was not issued to them, cannot be sustained.

9. For the aforesaid reasons, I find that the impugned order to the extent of respondent Nos. 9, 10 and 11 is correct, because they were not the partners of the firm, at the relevant time, but as far as respondent Nos. 1, 4, 7 and 8 are concerned, the order cannot be sustained. As far as accused Nos. 2, 3, 5 and 6 are concerned, their names are already deleted, and therefore, they were not affected by the impugned order. In view of this, the

impugned order to the extent of accused Nos. 1, 4, 7 and 8 will have to be set aside.

10. The Revision Application is partly allowed and the impugned order discharging accused persons to the extent of accused Nos. 1, 4, 7 and 8 stands set aside and quashed. C.C. No.7092/S of 1990 is restored to the file of the trial Court for proceeding as per law. Notices shall be issued to the accused Nos. 1, 4, 7 and 8. As the alleged offence was committed in October 1978 and the complaint was filed in 1990 and as, the matter is very old, the learned Trial Court shall expedite the hearing and dispose off the same, as early as possible.

[J. H. BHATIA, J.]